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July 14, 2014

VIA E-FILE

Ms. Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
MC 105
Austin, TX 78711-3087

Re: Docket No. 2014-0526-AIR; Air Quality Permit No. 97199; FML Sand, LLC; Industrial Sand Plant, Katemcy, Mason County.

Dear Ms. Bohac:

Enclosed is a copy of FML Sand, LLC's Response to Hearing Requests. I also certify that all persons listed on the attached Service List have been served copies via electronic mail or first class mail where noted. Please feel free to contact me at (512) 476-6328 if you have any questions.

Sincerely,



Paul Seals
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PAS/adt
Enclosures: as noted

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Docket No. 2014-0526-AIR; Permit No. 97199

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**TCEQ DOCKET NO. 2014-0526-AIR
TCEQ AIR QUALITY PERMIT NUMBER 97199**

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|------------------------------|----------|------------------------------|
| APPLICATION BY | § | BEFORE THE |
| FML SAND, LLC | § | TEXAS COMMISSION ON |
| INDUSTRIAL SAND PLANT | § | |
| KATEMCY, MASON COUNTY | § | ENVIRONMENTAL QUALITY |

APPLICANT’S RESPONSE TO HEARING REQUEST

FML Sand, LLC. (“FML” or “Applicant”) files this Response to Hearing Requests concerning the contested-case hearing requests that have been filed relative to FML’s application for proposed Air Quality Permit No. 97199 (“Application”). FML respectfully requests that the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) deny the hearing requests filed in this proceeding and approve Permit No. 97199 (“Permit”). As presented below, FML requests that the Commission find that the hearing requests filed in this proceeding are not valid hearing requests, that the persons requesting a contested-case hearing (“Requestors”) are not “affected persons”, and that the requests do not raise disputed issues of fact that are relevant and material to the Commission’s decision on the Application. In addition, the July 10, 2014 filing of the Mason County Rural Preservation Society should not be considered by the Commission.

Fundamentally, FML believes that the Requestors have not shown that they may be adversely affected by the air contaminants to be emitted as requested in the Application and authorized under the Permit. The evaluation of all the air contaminants proposed to be authorized demonstrates that FML will comply with TCEQ rules and regulations. Specifically, the evaluation demonstrates that: (1) the maximum ground level concentrations will be below National Ambient Air Quality Standards (“NAAQS”) and TCEQ standards; (2) no adverse health effects are expected; and (3) no degradation of the ecosystem, including effects on animals, crops, and plant life on ranches, farms, and businesses, is expected to occur. The Requestors are not affected by the proposed emissions of air contaminants that are the subject of the Application and the Permit.

BACKGROUND

Description of Facility

FML proposes to construct and operate a new industrial sand processing plant (“Plant”), which will consist of sand crushing, washing, drying, sizing, storing, and loading trucks with final product. The Plant facilities include material loading operations, screens, conveyance systems, a dryer, stockpiles, and truck loading operations. FML proposes that these facilities will operate a maximum of 8,760 hours per year, and the throughput of the Plant will be limited to a maximum of

500 tons per hour and 3,000,000 tons per year of sand. The Plant will use propane or sweet natural gas as the primary fuel for drying and related operations, which will generate particulate emissions in addition to products of combustion. The following air contaminants would be emitted: organic compounds (“VOCs”), nitrogen oxides (“NOx”), sulfur dioxide (“SO₂”), carbon monoxide (“CO”), and particulate matter (“PM”), including PM with diameters of 10 micrometers or less (“PM₁₀”) and 2.5 micrometers or less (“PM_{2.5}”).

The Plant is centrally located on an approximate 754-acre tract and is proposed to be located east of the intersection of Highway 87 and Ranch Road 1222 between the cities of Brady and Mason. The Plant is on the north side of RR 1222 in Katemcy, Mason County. See Attachment A, a copy of the Area Map from the State NSR Modeling Report in the Application, showing the Plant property, and the location of the Plant within the property.

Due to the proposed emissions of air contaminants from the Plant, FML must apply for the Permit from the Commission before beginning construction of the Plant. FML has applied to the TCEQ for a New Source Review Authorization under Texas Clean Air Act (TCAA), § 382.0518. The application is for a minor new source permit. The Permit will authorize the construction of the Plant. FML’s proposed mining operations are not part of the Application since mines and quarries are specifically excluded from the definition of “facility” in the TCAA, § 382.003(6).

Change of Ownership

On September 5, 2013, the ownership of the Plant site was transferred from the previous owner/operator, FTS International Services, LLC (formerly known as Proppant Specialists LLC) to a wholly-owned subsidiary of Fairmount Minerals, Ltd., “FML Sand, LLC”. The new site owner/operator is FML Sand LLC. The new site name is “FML Sand Katemcy”.

Procedural Background

The Application was received by the Commission on July 19, 2011, and declared administratively complete on August 1, 2011. The Notice of Receipt and Intent to Obtain an Air Quality Permit (“NORI” or “first public notice”) for the Application was published on August 17, 2011, in the Mason County News. The Application was determined to be technically complete on June 12, 2012. The Notice of Application and Preliminary Decision for an Air Quality Permit (“NAPD” or “second public notice”) was published on March 13, 2013, in the Mason County News. The Decision of the Executive Director and the Executive Director’s Response to Public Comment (“RTC”) were mailed on March 11, 2014.

PUBLIC COMMENTS, EXECUTIVE DIRECTOR'S RESPONSE TO COMMENTS, AND HEALTH EFFECTS REVIEW

Executive Director's Response to Comments

The substance of all public comments and their responses were incorporated in the "RTC". The RTC represents a comprehensive effort to assess and respond to all written comments provided to the TCEQ during the comment period. The RTC should be considered a compilation of the totality of comments made on the Application. Importantly, in light of recent court decisions, the RTC, which is supported by the agency's air dispersion modeling review and health effects review, should be given great weight in evaluating the hearing requests and determining whether there is a need for a contested-case hearing. In considering the hearing requests, the Commission should use the RTC in determining whether there are truly disputed issues of fact that are relevant and material to the Application.

Public comments were submitted in response to the Application. A number of the issues raised in the comments were not relevant and material to the Application. FML would point out that most of the comments (and hearing requests) were submitted prior to the second public notice; therefore, those comments did not consider the air dispersion modeling review and health effects review as well as the Executive Director's preliminary decision and draft permit. In addition, the issues raised in public comments that have been withdrawn, although addressed in the RTC, cannot be used as a basis to support the pending hearing requests. *See* comments of Gary and Karol Evans (received on September 13, 2011 and withdrawn on November 23, 2011) and Del Roy and Walt Reichenau (received on September 14, 2011 and withdrawn on July 5, 2012). The comments and hearing requests of Del Roy and Walt Reichenau were submitted on their behalf by letters from David A. Young, dated September 12, 2011.

The Executive Director identified and responded to the following issues raised in the comments.

1. **Air Quality/Health Effects (Humans, Animals, Plants)/Silica.** All of the air contaminants proposed to be authorized (PM, PM₁₀, PM_{2.5}, CO, NO₂, SO₂, and Silica) were evaluated as required by federal and state rules and regulations. After completion of air dispersion modeling and the health effects review, the Executive Director determined that based on the potential predicted concentrations no adverse short- or long-term health effects for the general public, including sensitive subgroups such as children, the elderly, or persons with respiratory ailments, animal life, crops, or vegetation are expected as a result of exposure to emissions from the proposed plant. In addition, adverse health effects are not expected for persons living on or visiting nearby properties.

2. **Air Dispersion Modeling.** After an audit by Executive Director's Air Dispersion Modeling Team to confirm and ensure that the model was conducted consistent with established EPA and TCEQ protocol, procedures, and requirements, the Executive Director determined that the modeling procedures, methodology, predictions, and results submitted by the Applicant were appropriate and acceptable.
3. **Cumulative Emissions.** The Executive Director determined the Applicant followed appropriate modeling procedures by conducting a preliminary impacts determination. Based on the modeling to determine whether predicted concentrations exceeded *de minimis* levels, the Applicant performed refined modeling for 24-hour PM₁₀ and 1-hour NO₂. In addition, the Applicant obtained conservative background concentrations to combine with the Plant's predicted concentrations to ensure that the combined concentrations are below the NAAQS.
4. **Stockpiles.** The Executive Director determined that the proposed and required controls are fully expected to ensure compliance with the prescribed opacity limits. In addition, the air dispersion modeling's maximum predicted ground level concentrations meet applicable federal and state standards.
5. **Emission Calculations and Controls.** The Executive Director determined that the proposed emission factors and the control efficiencies were acceptable. The proposed emission control methods are commonly used and accepted by the TCEQ and EPA, and are sufficient to demonstrate compliance with applicable law. The proposed and required controls are fully expected to accomplish a level of control required by BACT. The Executive Director found no basis to include any other specific requirements regarding measurement or monitoring.
6. **Air Monitoring.** The Executive Director determined that for a minor new source permit no site-specific air monitors are required. If Applicant complies with the conditions of the draft permit, no adverse impacts to public health or welfare are expected.
7. **Enforcement of Permit Conditions.** The Executive Director determined that the permit conditions are developed such that the proposed facility can be operated in compliance with applicable state and federal regulation and without causing a nuisance problem. TCEQ monitors compliance through a compliance program, which includes inspections, investigations of complaints, and enforcement mechanisms to ensure compliance with permits and state and federal laws.

8. **Statutory Basis for Permit.** The Executive Director determined that TCEQ cannot deny a permit if the applicant demonstrates that all applicable statutes, rules, and regulations will be met. The permit conditions are developed so that a facility that is operated in compliance with standards outlined in the TCAA and applicable state and federal rules and regulations.
9. **Permit Application Unclear and Incomplete.** The Executive Director determined that the Application was determined to be administratively and technically complete prior to the first and second public notices, respectively. Regarding technical completeness, the permit reviewer ensured that: all sources of air contaminants were identified; appropriate emission controls have been proposed, which will achieve at least BACT; and the accurate and acceptable emission rates, protectiveness review, and toxicology review have been completed.
10. **PM_{2.5} Representation.** The Executive Director believes that the commenter misinterpreted the 3,935 (sic) figure relating to emission calculations. The proposed PM_{2.5} emissions from the dryer (1.38 tpy) are generated by the combustion of propane. The modeled concentrations would be below the *de minimis* values for PM_{2.5} at the facility's property line.
11. **Special Conditions (SC) 5 and 6.** The Executive Director determined that the requirement to check visible emissions quarterly is in addition to other visible emissions and opacity limitations of the draft permit which are in effect at all times, visible emissions may not leave the property boundary under all operating conditions.
12. **SC7.** The Executive Director determined that emissions during Maintenance, Startup, and Shutdown are included in the hourly emission rates in the draft MAERT. These emissions are not expected to exceed the hourly emission rates in the draft MAERT and, thus, would not be in reportable quantities. Therefore, there is no conflict between SC 7 and footnote 6.
13. **SC8.** The Executive Director determined that the applicant must keep records to demonstrate the amount of the sand throughput is constant with the limits specified in SC 8 and the draft permit includes SC 27B that reiterates this requirement.
14. **SC14.** The Executive Director determined that, in addition to water, possible use of a calcium chloride solution on roads could be used for dust suppression. This aqueous solution would be used at a concentration of 0.27 to 0.40 gallon per square yard of area covered.

15. **SCs 18, 22, and 23.** The Executive Director determined that the TCEQ has the authority to request sampling as outlined in the permit special conditions. The Executive Director has the authority to include provisions in the permit allowing for the Executive Director and appropriately designated Executive Director's staff to waive certain requirements of the permit if an alternative method is acceptable to the Executive Director.
16. **SC27.** The Executive Director determined that with the exception of Harris County Pollution Control Services Department, the TCEQ does not have jurisdiction to grant authority to a county to request and receive facility records to determine permit compliance.
17. **Delay in Permitting/Environmental Impact Study.** The Executive Director determined that the public comment period was from August 17, 2011 to April 13, 2013. The TCEQ does not have authority to request environmental impact studies for air quality permits or for consideration of sand mining in permit application reviews. An Environmental Impact Study is not required for state actions such as this permit. However, both the TCAA and the TCEQ rules provide for an extensive review of the application to ensure that emissions from the proposed plant will not violate the NAAQS and will not be expected to adversely affect human health or the environment.
18. **Public Notice.** The Executive Director determined that FML complied with the TCEQ's newspaper publication and sign-posting requirements.
19. **Economic Impact.** The Executive Director determined that the TCEQ does not have jurisdiction to consider effects on property values or economic impact when determining whether to approve or deny a permit application.
20. **Location.** The Executive Director determined that the TCEQ does not have jurisdiction to consider facility location choices made by an applicant when determining whether to approve or deny a permit application unless state law imposes specific distance limitations that are enforceable by the TCEQ. Zoning and land use are beyond the authority of the TCEQ.
21. **Operating Hours:** The Executive Director determined that the TCEQ does not have the authority to regulate the hours of operation of a facility or site if the permit application review demonstrates that all applicable federal and state regulations are met.
22. **Trucks/Traffic Hazard/Roads.** The Executive Director determined that the TCEQ does not have jurisdiction to consider traffic, road safety, or road repair costs when determining whether to approve or deny a permit application. Jurisdiction over traffic on public roads, including any load-

bearing restrictions, and public safety including access, speed limits, and public roadway issues, are typically the responsibility of local, county, or other state agencies, such as the Texas Department of Transportation and the Texas Department of Public Safety.

23. Water Use. The Executive Director determined that issues regarding water use are not within the purview of this permit review.

24. Mining/Blasting/Land Reclamation Plan. The Executive Director determined that, the TCEQ does not have jurisdiction to regulate mines, quarries, any associated blasting, or to require applicants to establish a plan for land reclamation. Emissions of PM from the sand mine are subject to 30 TAC § 101.4, which prohibit a person from creating or maintaining a condition of nuisance.

25. Threatened or Endangered Species. The Executive Director determined that compliance with rules and regulations regarding endangered species is handled at the state level by the Texas Parks and Wildlife Department and at the federal level by the U.S. Fish and Wildlife Service. If the Plant is operated in accordance with the requirements of the Permit, no adverse impacts are expected. Applicant must also comply with 30 TAC § 101.4, which prohibits the discharge of contaminants that may be injurious to or adversely affect animal life or vegetation.

Health Effects Review of Proposed Silica Emissions

As part of the Application, FML performed a Modeled Emissions Impacts Analysis, which was included in the air dispersion modeling report. This analysis included an estimate of crystalline silica emissions from all on-site sources. FML determined that the predicted maximum off-property ground level concentration of silica will occur along the south property line along RR 1222.

The Executive Director's Toxicology Division conducted a health effects review of the proposed silica emissions. See Attachment B. The Toxicology Division compared the air dispersion modeling results to effects screening level ("ESL") and concluded that: the crystalline silica short-term ESL is highly conservative; the silica emissions were estimated using conservative assumptions that were likely to overestimate impacts; and no adverse health effects are anticipated to occur among the general public, as a result of exposure to the proposed emissions from the facility.

It is FML's understanding and belief that none of the Requestors is located in the area of the predicted maximum ground level concentration for silica.

LEGAL AUTHORITY

Hearing Request Requirements

Pursuant to 30 TAC § 55.201(a), a contested-case hearing request on the Executive Director's final permit decision must be filed no later than 30 days after the Chief Clerk mails the decision and RTC. Before considering the merits of a contested-case hearing request, the Commission must determine whether the request meets the necessary requirements established by the Commission at 30 TAC § 55.201(c) and (d). A timely, written hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested-case hearing; and
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the executive director's response to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy.

Affected Person Status Requirement

A contested-case hearing request must identify how and why the requestor will be adversely affected by the proposed air emissions in a manner not common to the general public (i.e., establish a personal justiciable interest), including a description of the requestor's use of the property that may be impacted by the proposed air emissions. 30 TAC §§ 55.156(d)(2), 55.201(d)(2). If a hearing request is granted, only relevant and material disputed issues of fact raised during the comment period can be considered.

The statute and the rules provide factors to be considered in determining whether a requestor is a person affected by the Executive Director's decision such that the decision affects a personal justiciable interest related to a legal right, duty,

privilege, power, or economic interest. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 5.115, Texas Water Code, 30 TAC § 203(a). For an individual requestor, Section 55.203(c) directs the Commission to consider:

- (1) whether the claimed interest is protected under the law under which the permit application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and the use of property of the person; and
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

Impact of *Sierra Club v. TCEQ*

The consideration of hearing requests by the Commission has been informed by the recent decision of the Third Court of Appeals in *Sierra Club v. Texas Commission on Environmental Quality and Waste Control Specialists*, No. 03-11-000102-CV (filed April 4, 2014), upholding the Commission's denial of Sierra Club's request for a contested-case hearing relating to the application of Waste Control Specialists for a by-product disposal license. The court recognized the Commission's exclusive jurisdiction over certain types of permits and the Commission's authority to determine the need for a contested-case hearing.

The critical threshold question in a contested-case hearing request is whether the requestor is an "affected person". Citing the Supreme Court decision in *Texas Commission on Environmental Quality v. City of Waco*, 413 S. W. 3d 409, 417 (Tex. 2013), the court addressed the definition of "affected person". An "affected person", under Section 5.115(a), Texas Water Code, is "a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest. Hearing requestors are required to establish that they have standing in the matter: "a concrete and particularized injury in fact, not common to the general public, that is (1) actual or imminent; (2) fairly traceable to the issuance of the permit as proposed; and (3) likely to be redressed by a favorable decision on its complaint."

The court held that a facially conforming request is not sufficient. The request is subject to a deeper inquiry into matters that might go to the underlying

merits of the permit application, which includes the likely effects of the proposed permit on the requestor. The court disagreed with the contention of the Sierra Club that the Commission was required to hold a contested-case hearing on a fact issue regarding likely effects that were raised by the Sierra Club's request.

The court confirmed that, in making an affected person determination, the Commission enjoys the discretion to weigh and resolve matters that may go to the merits of the permit application, including the likely impact the regulated activity on the hearing requestor. Again citing the decision of the Supreme Court, the court confirmed that the Commission's inquiry into impacts on the requestor may include references to the permit application, attached expert reports, the analysis and opinions of professionals on its staff, and any reports, opinions, and data it has before it. *See City of Waco*, 413 S. W. 3d at 420-21.

The court held that the Commission has the discretion to use this evidence in making its decision on a hearing request regardless of whether the Commission held an evidentiary hearing, as long as the requestor was afforded its regulatory rights to express his dissatisfaction with the proposed permit and the agency did not refuse to consider the evidence in support of that dissatisfaction.

In applying *Sierra Club* to the hearing requests in this proceeding, the Commission may rely on the information in the Application, the opinions of the permit engineer reviewing the Application and preparing the Permit, as well as the opinions of the Air Dispersion Modeling Team regarding their impacts review, and the experts in the Toxicology Division regarding their health effects review. This evidence supports a determination by the Commission that: (1) all air contaminants proposed to be authorized by the Permit were properly evaluated as required by federal and state rules and regulations; (2) emission calculations for those air contaminants represented in the Application are acceptable; (3) emission control methods represented in the Application are sufficient to accomplish a level of control required by BACT and best management practices; (4) the air dispersion modeling procedures, methodology, predictions, and results, submitted by the Applicant and audited by the Air Dispersion Modeling Team, were acceptable and the results properly represented potential impacts to human health and welfare; (5) based on the health effects review, no adverse short or long-term health effects for the general public or persons living or visiting nearby properties, including sensitive subgroups such as children, elderly, or persons with respiratory ailments, animal life, crops, or vegetation are expected as a result of exposure to emissions from the Plant; and (6) the Requestors are not affected persons.

As pointed out by the court, hearing requestors have to do more than make a facially conforming request. Requestors have an obligation to do more than say "the magic words". They must support their requests with specific and sufficient evidence that demonstrate how they will be affected by the Application. Not only must they show that the Application and its review was deficient, they must also

show how and why those deficiencies will result in a concrete and particularized injury of fact, not common to the general public.

The Requestors have been afforded a reasonable opportunity to provide evidence of the adverse impacts traceable to the Application. The public comment period extended from August 17, 2011 to April 12, 2013, over a year and a half. The Applicant submitted the modeling report on May 21, 2012. The modeling audit was completed by the Air Dispersion Modeling Team on June 12, 2012. The health effects review by the Toxicology Division was completed on August 31, 2012. The Executive Director's preliminary decision and draft permit were noticed on March 13, 2013. The last opportunity to file a hearing request expired on April 10, 2014.

THE HEARING REQUESTS

Thirty-eight hearing requests, from twenty-one individuals or groups, have been filed concerning the Application. Three of the requests have been withdrawn. Attachment C is a list of the Requestors with a summary of the issues raised in their hearing requests. FML has included in the attachment an estimated distance to the FML plant based on the limited location information in the hearing requests. In addition, FML has reviewed county tax information regarding Requestors properties, if any, within the vicinity of the Plant for this distance estimate.

It is Applicant's belief that the two hearing requests submitted by David A. Young by letters dated September 12, 2011 on behalf of Del Roy Reichenau and Walt Reichenau have been withdrawn. *See* letter from the Reichenaus dated July 5, 2012.

ANALYSIS OF HEARING REQUESTS

Hearing Requests Do Not Meet Necessary Requirements

Two of the requests are untimely. The last opportunity to request a hearing expired on April 10, 2014, which was thirty calendar days from the mailing of the Decision of the Executive Director and RTC on March 11, 2014. Two of the pending hearing requests were filed after the deadline, Sharon Thomason (April 13, 2014) and Brenda Wiggs (April 14, 2014). The remainder of the requests were in writing and were timely filed by April 10, 2014.

The timely-filed requests do not comply with the requirements in 30 TAC § 55.201(d) for hearing requests. The Requestors have failed to specify in sufficient detail to provide for Commission review of their location and distance relative to the proposed Plant and emission sources. In addition, the Requestors have failed to identify their personal justiciable interest affected by the Application and failed to explain in their requests how they would be adversely affected by the proposed Plant and emission sources in a manner not common to member of the general public. These requirements are clearly set forth in the first public notice of August

17, 2011 and the second public notice on March 13, 2013. Finally, the Requestors have failed to comply with 30 TAC § 55.201(d)(4), which is reiterated in the instructions from the Chief Clerk in the notice of the Decision of the Executive Director and RTC to specify any of the Executive Director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy.

FML recommends that the Commission find that none of the hearing requests meet the requirements of 30 TAC § 55.201(d) due to lack of specificity.

The Requestors Are Not Affected Persons

None of the Requestors have identified their personal justiciable interest affected by the Application. FML has applied for a minor new source permit. In the Application, FML has represented both emission rates for the air contaminants proposed to be emitted as well as emission controls designed to achieve at least BACT. The permit specifies terms and conditions ensure to ensure compliance with state and federal rules and regulations. The Requestors have not included any specific statement or information explaining not only the Requestors' location and distance relative to the Plant and emission sources to be authorized by the Permit but have failed to explain how and why they believe they will be adversely affected in a manner not common to members of the general public from the emissions represented in the application and subject to the terms and conditions of the Permit.

The Requestors have provided limited information regarding their proximity to the Plant. Given the siting of the Plant and emissions sources within the Applicant's property, the key location consideration is the individual requestor's distance, not to the Applicant's property line, but to the physical Plant and emission sources. This locational information combined with the modeling and health effects reviews is critical in the consideration of whether the requestors are affected persons.

Based on the limited information provided by the requestors, FML believes that none of the Requestors are located near the predicted maximum ground level concentration of particulate matter, including silica. If no adverse impacts are expected at the area of greatest offsite impact, the Requestors will not be affected. The impacts from the predicted emissions will affect the Requestors no different than members of the general public. The Requestors can show no concrete or particularized injury in fact, not common to the general public.

In addition, the Requestors have failed to provide evidence of the likely impact of the proposed emissions from the Plant. Under the parameters of *Sierra Club*, the Requestors must support their requests with specific and sufficient evidence that demonstrate how they will be affected by the Application. Not only

must they show that the Application and its review was deficient, they must also show that those deficiencies will result in a concrete and particularized injury in fact, not common to the general public, which is traceable to the issuance of the Permit as proposed.

FML recommends that the Commission determine that none of the Requestors are affected persons.

Requestors Do Not Raise Relevant and Material Disputed Fact Issues

In the event that the Commission determines, for the purposes of this proceeding, that any of the Requestors are affected persons entitled to a contested-case hearing (which FML disputes), FML requests that the Commission determine that the Requestors have not raised disputed issues of fact that are relevant and material to the Application and Permit.

After determining whether any of the Requestors are affected persons, the Commission must determine whether the hearing requests raise disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter, and that are relevant and material to the Commission's decision on the Application. Section 5.556(d), Texas Water Code and 30 TAC § 55.211(c). The Requestors have failed to raise disputed fact issues that are relevant and material to the Application.

As discussed above, the Executive Director provided for an extended public comment period – August 17, 2011 to April 13, 2013. The first public notice, August 17, 2011, provided an opportunity the Requestors to comment on the Application. The second public notice (comment period ended April 13, 2013), provided the Requestors on opportunity to comment on the Executive Director's preliminary decision and draft permit, which were supported by the air dispersion modeling report and audit as well as the health effects review. The Requestors were provided a reasonable and meaningful opportunity to provided evidence of disputed issues of fact that were relevant and material to the Application.

All public comments received were considered and addressed by the Executive Director in the RTC. A number of the issues were not relevant and material to the Application. These issues include: land use; property values; economic impacts; sand mining and associated emissions; use of explosives in sand mining; noise from blasting; noise pollution; truck traffic; impact of truck traffic on area roads; impacts on water supply and water quality; and impacts on the Hickory Aquifer.

With respect to the relevant and material issues, the Requestors have not provided sufficient information to put these issues in dispute. Based on the rationale of *Sierra Club*, hearing requestors have a burden to go beyond a "checklist of issues" to be considered a disputed issue of fact. The Commission is permitted to

undertake a deeper inquiry into the factual issues raised in the hearing requests, which may go to the merits of the Application.

If a hearing requestor raises an issue relevant to the Application such as emission rates, emission controls, BACT, best management practices, air dispersion modeling, health effects review, or permit terms and conditions, the requestor should be required to provide evidence demonstrating the deficiency or error and the likely impact or that error or deficiency on the Application. To spot an issue with nothing more is insufficient for the Commission to exercise its statutory gatekeeper authority.

In this case, the Requestors have purported to raise disputed issues but have not provided evidence that there are truly disputed issues. It is not sufficient to go down an air permit application checklist and raise generic issues as has been done in this case. To do so would render the statutory authority to determine the need for a contested-case hearing as meaningless. A requestor must do more than incorporate an issue checklist in a hearing request.

After consideration of the Executive Director's RTC and the requests, the Commission should find that all issues raised by the Requestors in their requests do not constitute disputed issues of fact that are relevant and material to the Application and Permit.

THE JULY 10, 2014 FILING OF THE MASON COUNTY RURAL PRESERVATION SOCIETY

In a transparent and belated attempt to rehabilitate its deficient hearing request, the Mason County Rural Preservation Society ("Society") filed an "engineer's report" ("Report") on July 10, 2014 to support of its hearing request. In considering the pending hearing requests, the Commission should disregard the Report as untimely and without merit.

If the issues raised in the Report are to be considered as support for the Society's hearing request as disputed issues relevant and material to the Application, those issues were required to have been raised during the public comment period. The comment period in this case expired on April 13, 2013. The Society has not shown, and cannot show, good cause as to why the Report could not have been submitted during the comment period. The Report is based on a review of documents that were available well before the end of the comment period. For example, the air dispersion modeling report, which includes representations of air contaminant sources and emission rates, previously been reviewed and accepted by the permit engineer, was submitted on behalf of the Applicant on May 21, 2012. The modeling audit was completed by the Air Dispersion Modeling Team on June 12, 2012. The health effects review by the Toxicology Division was completed on August 31, 2012. There is no reason to excuse the Society from the compliance with

the April 2013 public comment deadline regarding the information contained in the Report.

If the information contained in the Report is to be considered in determining whether the Society is an affected person, the Report was required to be submitted as part of the Society's hearing request. The deadline for hearing requests expired on April 10, 2014. More importantly, the Report is deficient in providing information supporting the Society's personal justiciable interest affected by the Application. The Report does not contain information to explain how and why the Society believes that it will be adversely affected in a manner not common to members of the general public from the emissions represented in the Application and subject to the terms and conditions of the Permit. Even considering the information in the Report, the Commission should determine that the Society is not an affected person.

Regarding the substance of the Report, FML offers the following response.

Quarry operations are not relevant to the Application. As a matter of law, FML's proposed mining operations are not part of the Application since mines and quarries are specifically excluded from the definition of "facility" in the TCCA Sec. 382.003(6).

The level of control for PM emissions from the baghouse, 0.005 gr/dscf, is commonly represented in new source permit applications and has been demonstrated through performance test. A properly maintained baghouse will be expected to continue to meet performance achieved through initial performance testing.

Additional dust control monitoring requirements, a dust control plan, or ambient air monitoring are not necessary or appropriate for a minor new source permit. The draft permit contains standard conditions for dust control for a minor new source permit.

The air dispersion modeling report at Table 1(a) contains represented air contaminant sources and emission rates based TCEQ approved factors and guidance. The impacts review was based on these representations. These representations contained in the Application are enforceable.

Silica health effects review was appropriate. The TCEQ no longer establishes ESLs as a percentage of published occupation exposure levels. This procedure was replaced by the more robust approach of evaluating the primary toxicological literature in setting ESLs. In this case, the short-term ESL for silica is 14 ug/m³, which was based on a thorough evaluation of the scientific literature on silica toxicity, use of a mild toxicological endpoint in animal species, and application of numerous conservative safety factors to ensure that the level is more than adequately protective of human health. The ESL is a fraction of OSHA's new

proposed occupational level (50 ug/m3) and there is no scientific basis for reducing it further.

The Report should not be considered by the Commission in determining whether to grant the Society's hearing request.

LOCATION AND DURATION OF THE CONTESTED-CASE HEARING

Should the Commission decide to refer this case to SOAH, FML recommends that the hearing be held in Austin, and last no longer than six months from the preliminary hearing to the proposal for decision.

FML'S RECOMMENDATION

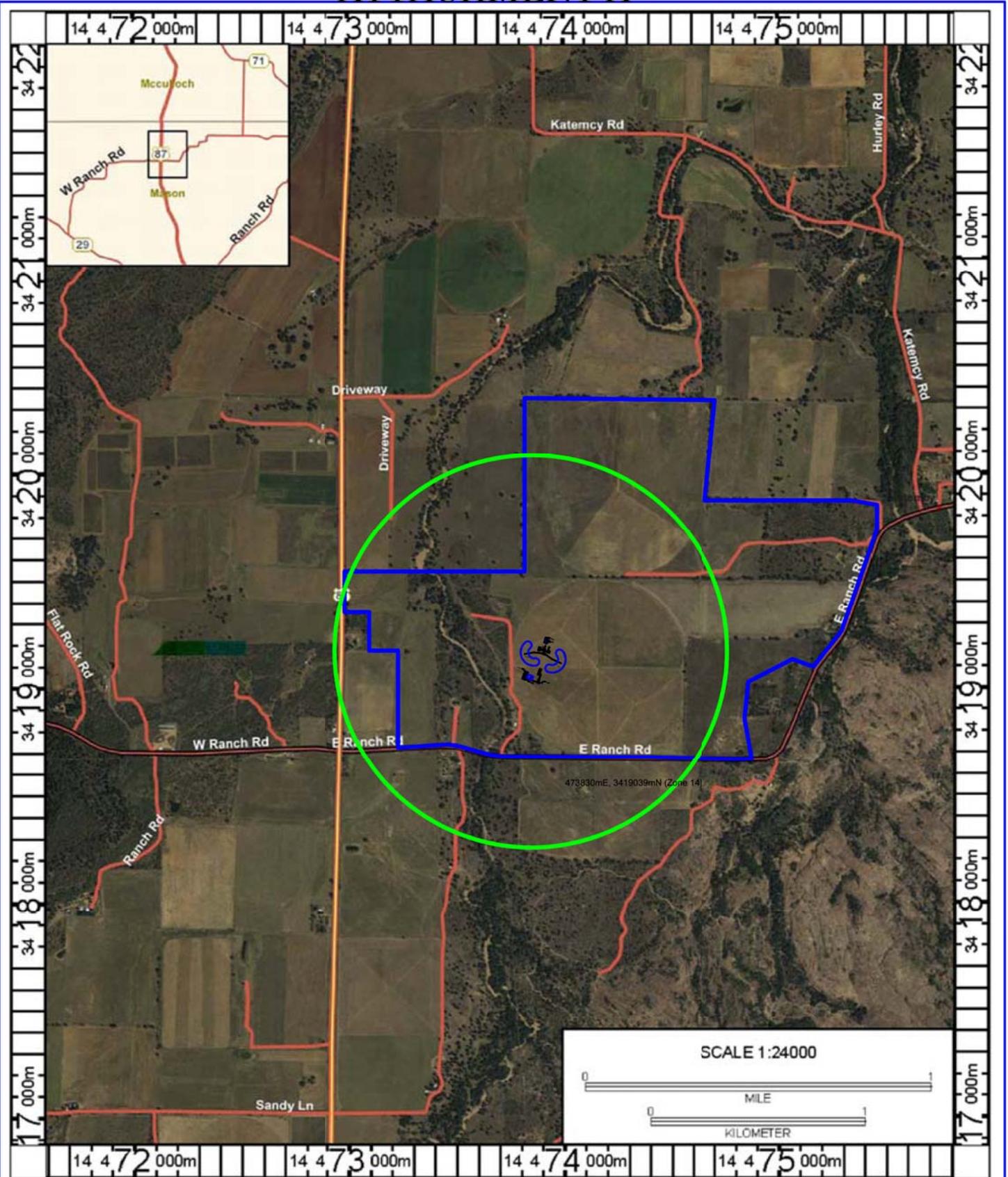
FML respectfully recommends the following actions by the Commission:

1. Find that none of the Requestors have filed a hearing request that meets the requirements of the Commission for such requests and deny the hearing requests;
2. Find that none of the Requestors are affected persons and deny the hearing requests;
3. Should the Commission find that any of the Requestors meet the requirements of 30 TAC § 55.205, the Commission find that there are no disputed issues of fact that are relevant and material to the Application and Permit; and
4. Should the Commission decide to refer this case to SOAH, FML recommends that the hearing last no longer than six months.

Respectfully submitted

By: 
Paul Seals
Texas State Bar No. 17947900
Guida, Slavich & Flores, PC
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Austin, Texas 78701
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Attorney for Applicant,
FML Sand, LLC

ATTACHMENT A



Datum: NAD83

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Aerial Photograph
 -Katemcy SE, TX (Sept. 30, 2008)
 MAP SOURCE: Terrain Navigator Pro



SITE
 LOCATION



ATTACHMENT C – AREA MAP

KATEMCY PLANT
 MASON COUNTY

PROPPANT SPECIALISTS

Filename: H:\Proppant Specialists\2011 Projects\Air\Mason\Construction

| | | | |
|---------------------------------|--------------------------|----------------------------|---------------------|
| Designed By: R. von Czoernig | Reviewed By: K. Ellis | Project No.: 010438.001 | Date: 04/27/2012 |
|---------------------------------|--------------------------|----------------------------|---------------------|

ATTACHMENT B

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Alex Berksan, P.E. Date: August 31, 2012
Air Permits Division
Office of Air

From: Tiffany Bredfeldt, Ph.D. TB
Toxicology Division
Office of the Executive Director

Subject: Health effects review of emissions from **Proppant Specialists, LLC**, Katemcy, Mason County, Texas (Permit No.: 97199, TOX Control No.: 7045)

At your request, we conducted a health effects review of emissions from Proppant Specialists, LLC facility. The company seeks to build a new sand processing facility. The goal of the following health effects review is to evaluate the modeled emissions that are expected to occur at this facility and whether these emissions are of concern to human health.

The Proppant Specialists facility is surrounded by open farm or range land. Site-wide refined modeling (AERMOD) was used to estimate the crystalline silica emissions from all on-site sources. The model identifies that the maximum off-property ground level concentration (GLC_{max}) will occur along the south property line next to a road that parallels the fence. Because the areas are farm or range land, all receptors are assumed non-industrial and the GLC_{max} will be evaluated as if it were a maximally affected non-industrial ground level concentration (GLC_{ni}).

The model indicates that the predicted $GLC_{max/ni}$ will exceed the crystalline silica ($14 \mu\text{g}/\text{m}^3$) health-based, short-term effects screening level (ESL) by 3.39 fold. Emissions are predicted to be greater than one times the ESL for 36 hours per year. Furthermore, crystalline silica concentrations are predicted to be greater than or equal to two times the ESL ($2 \times \text{ESL} = 28 \mu\text{g}/\text{m}^3$) for 3 hours per year. These exceedances occur at receptors to the south of the property that are considered very unlikely to be the site of human exposure due to their location and the nature of the property itself, which is located in an area unlikely to be developed now or in the future (see below e-mail correspondence).

The crystalline silica [short-term, health-based ESL](#) is highly conservative. It was based on a key animal study conducted by Warheit and colleagues (1991) where the lowest adverse effect level (LOAEL) was identified as the dose of crystalline silica used to induce mild inflammation in rats exposed for 6 hours per day for 3 days. This subacute study was chosen as the basis for the short-term ESL derivation because studies investigating the health effects induced by crystalline silica from shorter exposure durations were unavailable. Use of a subacute study wherein animals are repeatedly exposed for several hours per day for several days is a conservative starting point because the short-term ESL is designed to protect people from a 1 hour exposure. For adverse effects to be induced by a single, 1 hour exposure, the dose would have to be much higher than a dose that induces tissue inflammation over many hours and days. In fact, a dose that would harm lung tissue following a 1 hour exposure would likely be orders of magnitude higher than the aforementioned LOAEL. In addition, because there were no short-term studies evaluating the impact of inhalation of crystalline silica on lung tissue, the team that derived this ESL utilized higher uncertainty factors to account for this deficiency, further reducing the crystalline silica ESL. Thus, the exceedance of a very conservative ESL by a magnitude of 3.39 fold would not necessary be of concern given that the exposure scenario under which this value was derived was 18 h of exposure to higher concentration over the course of 3 days.

Alex Berksan, P.E.

Page 2

August 31, 2012

Another noteworthy consideration is that the crystalline silica ESL is applicable to particles that have an aerodynamic size less than or equal to 10 μm . The average size of crystalline silica particles to which study animals were exposed in the key study was 3.7 μm (Warheit et al., 1991). Particle size is inversely correlated with toxicity because smaller particles are able to migrate deeper into lung tissues and damage parts of the lung that have a high surface area (alveoli). When a larger surface area of the lung is damaged, one could anticipate that it would have a more profound effect on lung inflammation and subsequent function. This fact would add another layer of conservatism to the crystalline silica ESL since the LOAEL is identified from the effects induced by smaller particles.

Because the crystalline silica ESL is applicable to particles of 10 μm or less, the modeling of emissions would be based upon the impacts induced by larger particulate matter. In air dispersion modeling, where impacts are calculated in grams per second, a particle of larger aerodynamic size has a greater mass that will result in overestimation of impacts if the particulate matter in question is in reality smaller in aerodynamic size. Indeed, the particles of crystalline silica that are of greatest concern from a health effects perspective are the small ones (<7 μm for middle regions of lung and <3 μm for deep regions of lung). Given that modeling of impacts is based upon 10 μm , we deduce that the modeling approach itself is conservative, a fact that you also mention below.

Thus, considering the conservatism inherent to the crystalline silica ESL in addition to the magnitude of the short-term ESL, and that long-term ESL (0.27 $\mu\text{g}/\text{m}^3$) is not exceeded at any receptor; the proposed crystalline silica emissions are allowable.

In conclusion, we do not anticipate adverse health effects to occur among the general public, as a result of exposure to the proposed emissions from this facility. If you have any questions, please call me at 239-1799.

ATTACHMENT C

| Name | Mailing Address/Property Records | Distance from Plant | Summary of Issues |
|--------------------------|---|-------------------------|--|
| Gail Baker | 3498 E. RR 1222, Brady Texas 76825 Property records: none in area | 1.2 miles ENE | Sensitive family members (severe asthma, allergies, and sinusitis); health impacts of air contaminants including silica; impact on plants and animals; and impacts on overall air quality. |
| Robert J. Beaulieu | P.O Box 1709, Mason, TX 76856-1709 Property records: 3106 Granite Oaks Rd, Katemcy (Mason), TX 76856 3058 Lange-Polk Road, Mason, TX 76856 | 3.1 miles ESE | Sensitive family member (allergies); health impacts of dust; no testing for PM2.5; errors in application; facility financing; and control efficiency and emission estimate for PM2.5. |
| James Bode | 2441 Twin Lakes Lane, San Angelo, TX 76904 Property records: none in area | San Angelo | Sensitive family member (cancer, infections, and bronchitis); silica health impacts; inadequate silica monitoring; impacts on water supply and water quality; road damage; noise pollution; and effect on wildlife, hunting, ranching, and farming. |
| Gerald Gamel | 1831 Katemcy Rd., Brady, TX 76825 Property records: 1831 Katemcy Rd., Brady, TX 76825 | 1.2 miles ENE | TCEQ oversight and enforcement; year-round "dusting" - adversely affect plant life, domesticated livestock production, wildlife mating and migration patterns and general quality of life; silica health impacts; waste sand disposition; impact of truck traffic and heavy equipment on air quality; blasting; chemical treatment of sand product; cumulative impact of other sand mines in the area; emission standards; and long-term effect of sand mining on air and water quality. |
| Steven and Merlina Gamel | 2401 Katemcy Rd., Brady, TX 76825 Property records: 2401 Katemcy Rd., Brady, TX 76825 | 1.6 miles NE | TCEQ oversight and enforcement; year-round "dusting" - adversely affect plant life, domesticated livestock production, wildlife mating and migration patterns and general quality of life; silica health impacts; waste sand disposition; impact of truck traffic and heavy equipment on air quality, blasting; chemical treatment of sand product; cumulative impact of other sand mines in the area, and emission standards for PM. |
| Cheryl Glass | P.O. Box 1714, Mason, TX 76856 Property records: 204 W. Rainey Street, Mason, TX 76856 | 11.6 miles S (Mason) | Suffers from neurological disease; health impacts in the community; silica impacts from mining and transportation; silica health impacts; cumulative impact of radon in water supply; impacts on wildlife; and PM impacts on equipment and buildings. |

| | | | |
|--|--|-------------------------------|---|
| <p>James R. and Lisa K. Heath</p> | <p>529 W. Ranch Road 1222, Mason, TX 76856 Property records: 529 W. Ranch Road 1222, Mason, TX 76856</p> | <p>1.5 miles WSW</p> | <p>Sensitive family member (reactive airway disease); impacts on health, property, livestock, and the local community; impact of PM due to weather inversion; cumulative impacts of other sand mining facilities; application incomplete; insufficient application information to quantify, model and regulate emissions; failure to identify all emission sources; inappropriate emission factors; failure to speciate air contaminants; failure to identify, speciate, quantify, and model all fugitive sources; failure to properly identify, speciate, quantify, and model fugitive emissions from roads; failure to properly identify, speciate, quantify, and model emissions from transport vehicles; insufficient demonstration of BACT; inability of proposed controls to meet performance characteristics and efficiencies represented in the application; improper control factors; inability of proposed controls to sufficiently control small and fine particulate; improper and insufficiently stringent opacity limits; improper modeling inputs, assumptions, and adjustments; improper health effects review; inappropriate factoring of background and ambient air quality conditions in the modeling; improper determining and factoring of cumulative effects in the modeling and health effects review; contribution to a violation of state and federal air quality standards; cause or contribution to a nuisance condition; emissions injurious to human health, animals, livestock, and plants; and insufficient definition in the draft permit to ensure compliance with application representations and applicable air quality regulations and standards.</p> |
| <p>Mason County Rural Preservation Society</p> | <p>707 Rio Grande, Suite 200, Austin, TX 78701 Property records: members own property at various locations, see member info. Members: Gail Baker, James Bode, Gerald Gamel, Steven & Merlina Gamel, Cheryl Glass, James R. & Lisa Heath, Lydia Nesloney, Tiffnee Nesloney, Trey Nesloney, Jeanne Nixon, Connie Stockbridge, Janis & Weldon Strickland, Wesley Strickland, Danny & Sharon Thomason, Brenda Wiggs, Waleter Guy Wiggs.</p> | <p>See member information</p> | <p>Air quality impacts to human, plant and animal life; PM and silica health effects; "blow off" of waste sand; air quality impacts of processing, transport, and blasting sand and rock; dispersion of treatment chemicals; BACT; the impact of local geographical and meteorological conditions on modeling; cumulative impact of other sand plants; completeness of application; identification of all emission sources; proper emission factors; speciation of air contaminants for proper identification, quantification, and modeling; proper consideration of sources of emissions that are not "facilities"; capability of proposed control to meet performance characteristics and efficiencies; proper execution of modeling; proper conduct health effects review; appropriate background and ambient air quality conditions determined and considered in modeling and health effects review; applicant's operation cause or contribute to nuisance conditions; proper posting of draft permit; and protectiveness and enforceability of draft permit, including SCs 5, 6, 7, 8, 14, 18, 22, 23, and 27.</p> |

| | | | |
|--------------------|--|----------------------|--|
| Lydia G. Nesloney | 11112 Flat Rock Rd., Mason, TX 76856-6209 Property records: 11112 Flat Rock Rd., Mason, TX 76856-6209 | 1.4 miles W | Air pollution concerns; health and environmental risk; required modeling and monitoring of small particles from sand mining, processing, storing, and trucking; modeling and monitoring of silica; silica impacts; reclamation of sand mines; heavy equipment and diesel truck impact on air quality; cumulative impact of other sand mines; failure to model emissions from other sand mines; inappropriate use of air monitor for background ambient concentration; monitoring of PM2.5 at all times; proper emission controls and monitors; and TCEQ's failure to enforce. |
| Tifnee G. Nesloney | 8100 N. Mopac Expy, Austin, TX 78759 Property records: 736 Sandy Lane Road, Camp Air,(Mason) TX 76856 7499 N. US HWY 89, Katemcy/Camp Air, (Mason) TX 76856 | 1.7 miles SW | Sensitive individual (bronchitis); health impacts to family and friends in the community and livestock; cumulative impact of other sand plants on local agriculture; and silica impacts on plant and animal growth. |
| Trey Nesloney | 11603 Ladera Vista Dr., Unit #16, Austin TX 78759 Property records: 736 Sandy Lane Road, Camp Air, (Mason) TX 76856 7499 N. US HWY 89, Katemcy/Camp Air, (Mason) TX 76856 | 1.7 miles SW | Sensitive individual (allergies); health impacts from dust emissions from sand mining operations; cumulative impact of other plants on local agriculture and the public welfare; and silica impacts on plant and animal growth; appropriate monitoring for PM; exceedance of the short-term Effects Screening Level and the Toxicology Division health; appropriateness of air monitor for background ambient concentrations; consideration in the modeling of local geographical and meteorological conditions; cumulative impacts of existing plants; and silica monitoring. |
| Jeanne M. Nixon | PO Box 823, Mason, TX 76856 Property records: 2358 Lower Willow Creek Rd., Art, TX 76820 | 19.6 miles SE | Impacts on crops, livestock, plants, and health; and impact of truck traffic on roads. |
| Connie Stockbridge | PO Box 731, Mason, TX 76856 Property records: 1948 Katemcy Rd., Katemcy, (Brady) TX 76825 | 11.6 miles S (Mason) | TCEQ oversight and enforcement; year-round "dusting" - adverse affect on plant life, domesticated livestock production, wildlife mating and migration patterns and general quality of life; silica health impacts; "blow off" of waste sand; blasting; impact of truck and heavy equipment use on air quality; truck traffic on area roads; chemical treatment of sand product; cumulative impact of other sand mines in the area; and PM emission standards, testing and inspections. |

| | | | |
|------------------------------------|---|----------------------|---|
| Weldon B. and Janis Kay Strickland | 1114 Ischar St., Mason, TX 7865-1183 Property records: 1035 Westmoreland, Mason, TX 76856-1183 1114 Ischar Street, Mason, TX 7865-1183 | 11.0 miles S (Mason) | Sensitive individual (Adult Respiratory Distress Syndrome); air pollution and nuisance conditions from the plant; impact on Hickory Water Aquifer; accuracy of impact studies; and impact of increased truck traffic in the area. |
| Wesley B. Strickland | 1035 Westmoreland Mason, TX 76856-1183 Property records: 1035 Westmoreland Mason, TX 76856-1183 | 10.9 miles S (Mason) | Sensitive family member (Adult Respiratory Distress Syndrome); air pollution and nuisance conditions from the plant; impact on Hickory Water Aquifer; accuracy of impact studies; and impact of increased truck traffic in the area. |
| Danny Keith Thomason | 2165 East Ranch Road 1222, Brady, TX 76825 Property records: 2165 East Ranch Road 1222, Brady, TX 76825 | 1.2 miles ENE | TCEQ oversight and enforcement; impact of dust and silica on humans, wildlife, livestock, and plants; water quantity and quality impacts on Aquifer; silica impacts on school children traveling nearby roads; damage to homes and land from explosives used to mine sand; and air quality impacts from blasting. |
| Sharon Lynn Thomason | 2165 East Ranch Road 1222, Brady, TX 76825 Property records: 2165 East Ranch Road 1222, Brady, TX 76825 | 1.2 miles ENE | TCEQ oversight and enforcement; impact of dust and silica on humans, wildlife, livestock, and plants; water quantity and quality impacts on Aquifer; silica impacts on school children traveling nearby roads; damage to homes and land from explosives used to mine sand; and air quality impacts from blasting. |
| Brenda Wiggs | 2165 East Ranch Road 1222, Brady, TX 76825 Property records: 2174 E. Ranch Road 1222, Brady, TX 76825-8807 | 1.2 miles ENE | TCEQ oversight and enforcement; impact of dust on humans, animals and plant life; impact on water; silica health effects; and loud noises from blasting. |
| Walter Guy Wiggs | 2165 East Ranch Road 1222, Brady, TX 76825 Property records: 2174 E. Ranch Road 1222, Brady, TX 76825-8807 | 1.2 miles ENE | TCEQ oversight and enforcement; impact of dust on humans, animals and plant life; impact on water; silica health effects; and loud noises from blasting. |